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No. 323

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALEXANDER L. GUTERMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (App. II, 18-38; Pet. App. 55-74) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1960 (App. II, 18; Pet. App. 55). The peti-

[1] The record consists of nine volumes. Volumes one through seven, which are consecutively paginated, constitute the reporter's transcript of the trial and will be referred to as "Tr." The remaining two volumes are appendices of selected government and defense exhibits at the trial, and contain some of the proceedings in the trial court and court of appeals, to which reference shall be made as "App. I" and "App. II", respectively. In addition, we are lodging with the Clerk of this Court other government exhibits at the trial, which will be referred to as "G. Ex."

tion for a writ of certiorari was filed on August 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for willful failure to file certain reports under the Securities Exchange Act.

2. Whether petitioner had a fair trial.

3. Whether various rulings on the evidence were proper.

4. Whether portions of the Securities Exchange Act and rules promulgated thereunder are constitutional.

5. Whether cumulative fines were properly imposed.

STATUTES AND RULES INVOLVED

Section 16 of the Securities Exchange Act, 15 U.S.C. 78p., provides in pertinent part:

> (a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in

such ownership during such month, shall file with the exchange a statement (and a duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

* * * * *

Section 20 of the Securities Exchange Act, 15 U.S.C. 78t, provides in pertinent part:

* * * * *

(c) It shall be unlawful for any director or officer of, or any owner of any of the securities issued by, any issuer of any security registered on a national securities exchange, without just cause to hinder, delay, or obstruct the making or filing of any document, report, or information, required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title

Section 32 of the Securities Exchange Act, 15 U.S.C. 78ff, provides in pertinent part:

(a) Any person who willfully violates any provisions of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or docu-

ment required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

* * * * *

Rule 240.3b-1 of the Securities and Exchange Commission, 17 C.F.R. 240.3b-1, provides:

> The term "listed" means admitted to full trading privileges upon application by the issuer or its fiscal agent or, in the case of the securities of a foreign corporation, upon application by a banker engaged in distributing them; and includes securities for which authority to add to the list on official notice of issuance has been granted.

Rule 240.13a-1 of the Securities and Exchange Commission, 17 C.F.R. 240.13a-1, provides:

> Every issuer having securities listed and registered on a national securities exchange shall file an annual report for each fiscal year after the last full fiscal year for which financial statements were filed

in its application for registration. Registrants on Form 8-B shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. The report shall be filed within 120 days after the close of the fiscal year or within such other period as may be specified in the appropriate form.

Rule 240.16a-1 of the Securities and Exchange Commission, 17 C.F.R. 240.16a-1, provides in pertinent part:

* * * * *

(b) Every person who at any time during any month has been directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is listed on a national securities exchange, or a director or an officer of the issuer of such security, shall, if there has been any change during such month in his ownership of any equity security of such issuer, whether registered or not, file with each exchange on which any equity security of the issuer is listed and registered a statement on Form 4 (and a single duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month. Such statements must be received by the Commission and the exchange on or before the tenth day of the month following that which they cover.

* * * * *

(d) Every person who becomes directly or in-

directly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security), which is listed on a national securities exchange, or becomes a director or an officer of the issuer of such security, shall file with each exchange of which any equity security of the issuer is listed and registered a statement on Form 6 (and a single duplicate original thereof with the Commission) of the amount of all equity securities of such issuer, whether registered or not, so beneficially owned by him immediately after becoming such beneficial owner, director or officer. Such statement must be received by the Commission and the exchange on or before the tenth day following the day on which such person became such beneficial owner, director, or officer. Such person need not file the statement required by this paragraph, if prior to such tenth day and during the calendar month in which he has become such beneficial owner, director, or officer, there has been a change in his beneficial ownership which will require him to file a statement pursuant to paragraph (b) of this section with respect to the same securities.

* * * * *

Rule 240.16a-2 of the Securities and Exchange Commission, 17 C.F.R. 240.16a-2, provides in pertinent part:

In determining, for the purpose of § 240.16a-1, whether a person is the beneficial owner, directly or indirectly, of more than 10 percent of any class of any listed equity security, such class shall be

deemed to consist of the amount of such class which has been issued, regardless of whether any part of such amount is not listed or registered or is held by or for the account of the issuer; * * *.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals affirming his conviction on fourteen counts charging various violations of the Securities Exchange Act and conspiracy to violate the Act, arising out of petitioner's ownership of stock in and control of the F. L. Jacobs Company.[2] Count 1 charged that petitioner personally failed to file an "insider report" required under Section 16 (*supra*, pp. 2-3) for his insider dealings in the stock of Jacobs while he was an officer and director of that company. Counts 10 to 20 charged failure to file "insider reports" by petitioner's personal holding company, Comficor, Inc., when there were changes in Comficor's beneficial ownership of Jacobs stock at a time when Comficor owned more than 10% of Jacobs stock listed on a national securities exchange. Count 5 charged that petitioner and Robert Eveleigh obstructed the filing of the annual report of the Jacobs Co. for the year ending July 1958. Count 21 charged a conspiracy to violate the various substantive provisions of the Act and to defraud the functioning of the Securities and Exchange Commission (App. I, 15-40). Petitioner was sentenced to 4 years and eleven months on the conspiracy count (with lesser concurrent terms on the others), and to cumulative fines of $10,000 on each count, now totaling $140,000.

[2] The Court of Appeals reversed the convictions on two counts.

The evidence may be summarized as follows:

1. *Background: The "insider" trading in Jacobs stock, and the general scheme (Count 21).*

Petitioner and Eveleigh, who were directors, officers and substantial shareholders of the F. L. Jacobs Company, controlled the affairs of Jacobs from early 1957 until February 1959. Petitioner was chairman of the board of directors and president, while Eveleigh was vice president and treasurer (Tr. 533, 594, 989, 1013-1014, 1017, 1671, 1677; App. I, 131). During this period, petitioner maintained two personal holding companies—Chatham Corporation and Comficor, Inc. (formerly named Commercial Fidelity Corporation and, earlier, United States Totalisator Corporation)—and directed their affairs, with the assistance of Eveleigh, through dummy officers (Tr. 1043, 1447, 1515-1518, 1538, 1545-1546, 1549, 1557, 1740, 2208-2209, 2404-2406, 2413-2416, 2434, 2437-2441, 2444-2445, 2510, 2688-2691, 2702, 2706-2711, 2717-2724, 2764, 2770, 2777-2781, 3111-3117, 3122-3125).

Throughout 1958, funds passed freely between Jacobs, Comficor and Chatham (Tr. 1740-1749; see Tr. 2611, 2808). Eveleigh told Seymour Lipton, the assistant treasurer of Jacobs in New York (Jacobs maintained offices in New York and Detroit), to treat the funds of Jacobs, Comficor, Chatham, and the petitioner as "one kitty" (Tr. 1762). The flow of money from Jacobs to Comficor for the twelve month period ending July 31, 1958 (the close of the 1958 fiscal year), totaled $2,114,000, most of which was unsecured by Comficor (Tr. 1741-1742, 1760; see Tr. 1912-1913). While Jacobs'

books reflected that Comficor owed Jacobs approximately $33,000, the accountants, in January 1959, determined that Comficor was indebted to Jacobs in the amount of approximately $1,400,000 as of July 31, 1958 (Tr. 617-622; see Tr. 325-326, 915-916, 1912-1913).

Also throughout 1958, petitioner, Eveleigh, and Comficor pledged substantial quantities of their holdings in the common stock of Jacobs and most of the shares which Jacobs owned in the Scranton Corporation[3] with moneylenders as collateral on loans made to the petitioner, Eveleigh, Comficor, and Chatham (Tr. 1370, 1430-1432, 1435-1437, 1440, 1441, 1446-1449, 1452-1456, 1458, 1475-1476, 1514-1518, 1520-1521, 1536-1539, 1542, 1545-1546, 1548, 1551, 1557, 1563, 1569-1570, 1939-1943, 1951-1952, 1973-1975, 1989-1990, 2244, 2247-2249, 2252, 2291-2294, 2234-2236, 2341, 2348-2351, 3758-3763, 3770-3771; see App. II, 4b-10b). Petitioner handled many of the negotiations with the moneylenders for the Comficor loans (Tr. 1349, 1431-1432, 1515-1518, 1537-1536, 1538-1539, 1546, 1549, 1616-1617, 1634-1635, 1977-1978, 2227-2232, 2244, 2282-2283, 2334), and guaranteed most of the notes in evidence at the trial. The loan agreements contained margin provisions requiring the borrowers to post additional collateral or to pay down the loan in the event that the market price of Jacobs stock dropped.

The market price of Jacobs stock was maintained

[3] In February 1958, Jacobs sold one of its divisions to the Scranton Corporation for 40,000 shares of Scranton stock (Tr. 623, 2581-2582). On July 30, 1958, Jacobs sold two subsidiaries to the Scranton Corporation. None of these sales was recorded in Jacobs' financial books as of March 1959, the time when the management of Jacobs passed to trustees (Tr. 613-615, 1706-1707, 1713, 2848-2853).

through substantial periodic purchases of the stock by Comficor through eleven brokerage houses (Tr. 1137-1141, 1146-1149, 1154-1156a, 1169, 1178, 1180-1182, 1213-1214, 1216, 1227-1232, 1242-1247, 1263, 1265-1267, 1285-1288, 1313, 1315-1316). Petitioner and Eveleigh made the initial arrangements with the brokers and were kept regularly informed of market conditions and prices in Jacobs stock (Tr. 1136-1141, 1156-1159, 1176-1181, 1261-1264). The money for these stock purchases was obtained by Comficor from moneylenders, who accepted the stock purchased as collateral and remitted the loan proceeds to the brokerage houses to pay for the stock acquisitions (Tr. 1696, 1698-1699, 1773-1775; see Tr. 1269).

On September 4, 1958, petitioner and Eveleigh exercised options to purchase stock in Jacobs. In December 1958, petitioner and Eveleigh borrowed $200,000 from the Silver Company secured by 35,000 shares of this option stock (Tr. 1551; G. Exs. 123, 210, 211). Petitioner filed an "insider report" for his purchases of 50,000 shares of option stock (Tr. 1031-1032; App. I, 151-152). No reports were filed for the transactions involved in the substantive counts, *infra*, pp. 11-12.

2. *Count 1: Failure of petitioner to file an insider report.*

In December 1958, the Judson Commercial Corporation caused its brokerage house to sell 4,600 shares of Jacobs stock for the petitioner's account (Tr. 1947-1948). These shares constituted part of the collateral on a $42,000 loan made by Judson to the petitioner earlier in the year (Tr. 1942-1943, 1946-1948). Judson,

which was in frequent touch with the petitioner in December 1958 and January 1959, informed him of these sales by telephone, in person and by written notice (Tr. 1979-1985, 2025, 2212, 2217-2218, 2228). Petitioner did not file an "insider report" (Form 4) for December 1958 (Tr. 1032-1034).

3. Counts 10-20: Failure of Comficor to file insider reports.

From June 1955 until September 1958, the total number of Jacobs shares registered and listed on the New York Stock Exchange was 882,607 (Tr. 3702; *see* Tr. 1886). The total number of Jacobs shares registered and listed subsequent to September 1958 was 963,107 (Tr. 1011-1012, 1107-1111, 3703; *see* Tr. 1888). From December 1957 through July 1958, and from November 1958 through January 1959, Comficor owned more than 10% of Jacobs stock registered and listed on the New York Stock Exchange, and purchased and or sold Jacobs stock during these months (Tr. 1140-1141, 1146, 1149, 1158, 1169-1170, 1180-1181, 1213-1216, 1230-1233, 1244-1247, 1265-1268, 1287-1288, 1315-1316, 1321-1322, 1462-1465, 1470, 1473, 1564-1565, 1572-1573, 1578-1579, 1767, 1770-1773, 1970-1971; App. I, 123; *see* App. I, 124).[4] No Form 4's (insider reports) were filed on behalf of Comficor for these months (Tr. 1033-1034).

As indicating knowledge and willfulness, there was evidence that in March 1958, when the New York

[4] Since many of the loans made by the Silver Company to the petitioner, Eveleigh, and Comficor were cross-collateralized, the loans were regarded as "one big pot" for liquidation purposes on sale of collateral (Tr. 1578-1579).

Stock Exchange inquired of the petitioner whether Comficor had filed Form 4's with respect to Jacobs stock, petitioner replied that "they purchased and sold and that they did not have sufficient [stock] to report" (Tr. 4052-4053). Comficor's records, as early as December 31, 1957, disclosed that Comficor held more than 10% of Jacobs outstanding stock, and that its holdings were continually growing (Tr. 1770-1773). In June 1958, when the New York Stock Exchange was investigating the timing of Comficor's purchases of Jacobs stock, petitioner stated that "he was familiar with their [Comficor's] operations" (Tr. 4067).

Petitioner personally caused the opening of many Comficor accounts in various brokerage houses which purchased Jacobs stock for Comficor's account; considered the margin problems; kept a close check on market behavior in Jacobs stock; and occasionally placed orders on Jacobs stock for Comficor (Tr. 1137-1140, 1178, 1181, 1263, 1269-1270, 1282, 1763, 1767). On one occasion, stock purchased for the account of Commercial Fidelity Corporation (Comficor's earlier name) was personally delivered to the petitioner (Tr. 1158). Throughout 1958, petitioner negotiated for many of the loans to Comficor and guaranteed most of them (Tr. 1447, 1515-1518, 1538, 1545-1546, 1549, 1557, 2208-2209). When once questioned as to "who was Comficor", petitioner replied, "That's me" (Tr. 1299; see Tr. 1190, 1210-1211, 1516-1518, 1536, 1538-1559, 1964, 1968-1969).

4. Count 5: Obstructing the filing of an annual report of Jacobs.

In May 1958, the accounting firm of Ernst & Ernst discussed with petitioner and Eveleigh the impending audit of Jacobs for the fiscal year ending July 31, 1958 (Tr. 302, 306-309, 311-313). In a letter to the petitioner and Eveleigh on July 9, 1958, Ernst & Ernst stated that the audit would commence in a short time and that certain reports, supporting data, and audits of subsidiaries by others would be required (Tr. 521-523). Neither petitioner nor Eveleigh replied to the letter.

About July 15, 1958, William Carey of the New York office of Ernst & Ernst unsuccessfully tried to communicate with Eveleigh. Until he contacted Eveleigh in late September, Carey called the Jacobs' office once or twice a week (Tr. 874-881). Eveleigh told Carey that Jacobs' books were not ready to be audited and that he would telephone Carey when they were ready (Tr. 882). In several other telephone conversations at about this time, Eveleigh told Firman Haas of Ernst & Ernst's Detroit office that Jacobs' books were not ready for auditing. He gave no indication when they would be ready (Tr. 314-315). In September, Ernst & Ernst wrote petitioner and Eveleigh that little progress could be made on the audit until the main office books of Jacobs (New York) were prepared (Tr. 525-528). No answer to the September letter was received by Ernst & Ernst.

In late October, Carey spoke to Eveleigh and reminded him that the July 31st examination had not

yet begun, that the annual report on Form 10-K was due in about 30 days, and that the audited financial statements were part of the Form 10-K (Tr. 882-884, 895). Eveleigh stated that the books were not ready for auditing, and that he was going to go to Detroit to discuss the audit with Ernst & Ernst there. In a letter to the petitioner and Eveleigh in November, Ernst & Ernst requested Jacobs' monthly financial statements, and sought permission to review Jacobs' main office records (Tr. 315-317). No reply was made to this letter (Tr. 317).[5]

On December 1, 1958, Haas and Carey met the petitioner and Eveleigh in New York, and requested certain records and data which was needed for the audit (Tr. 318-322, 885-886).[6] The main office books of Jacobs were not made available to Ernst & Ernst prior to December 3, 1958, and "(v)ery little, if any", information was made available to Ernst & Ernst subsequent to that time (Tr. 321, 322, 326-329, 331, 335, 590, 598, 602, 629-630, 845, 847, 895-896, 906, 915-916). Haas testified that he was still waiting for some of the information which Eveleigh said was "in the office" (Tr. 335).

By February 1959, Ernst & Ernst had prepared an analysis of Comficor's account, and gave petitioner two confirmation letters showing that Comficor owed Jacobs

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[5] On November 25, 1958, Jacobs obtained a 60 day extension of time (from November 28, 1958) from the SEC within which to file its annual report on Form 10-K.

[6] For example, the auditors wanted to inspect the contracts pursuant to which Jacobs bought or sold assets or borrowed money. They wanted to know the location of Jacobs' 40,000 shares in Scranton and the location of stock of certain subsidiaries (Tr. 318-322, 625-628).

over $1,717,000 as of July 31, 1958. (G. Exs. 22, 23). At a subsequent meeting with Haas and Carey, petitioner said that the Comficor figures were incorrect, and that certain credits due Comficor from Jacobs would balance out the account as of July 31, 1958 (Tr. 325-327).[7] Neither the petitioner nor Eveleigh produced any supporting data with respect to these "credits," although the auditors said that they would welcome any such information.[8] At the close of this meeting, petitioner said to Haas, "Firm, we need you. I have been derelict in my duty and don't be too harsh with me" (Tr. 330).

The audit of Jacobs' books for the fiscal year ending July 31, 1958, was not completed due to a lack of information. Ernst & Ernst was unable to render an opinion on Jacobs' books or to certify the financial statements of Jacobs for the year ending July 31, 1958 (Tr. 337-338, 590, 630-631, 634, 845-847). No Form 10-K (annual report) was filed with the New York Stock Exchange for Jacobs' fiscal year ending July 31,

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[7] At this meeting petitioner told Haas that he knew the location of the "missing" Scranton shares. "There are 40,000 shares out for transfer with the transfer agent, and there are about 20,000 shares around the office" (Tr. 328). The auditors were not shown the 20,000 shares "around the office", and no verification was offered that 40,000 shares were with the transfer agent. The schedule which Eveleigh prepared for the "missing" 40,000 Scranton shares was "practically worthless" (Tr. 329). Most of Jacobs' Scranton shares had been pledged with moneylenders on loans to the petitioner and Comficor (Tr. 3758-3761, 3763, 3770-3771; App. II, 4-10).

[8] From August 1, 1958, to February 1959, Lipton met with little success in efforts to obtain data from the petitioner and Eveleigh on business transactions of Jacobs (Tr. 1680-1681, 1683-1685, 1690-1695, 1701, 1706-1707, 1711-1714, 1720, 1728-1731, 1743, 1745-1747, 1790, 1793, 1801, 1805-1806, 1848, 1851). Eveleigh denied financial information which Locke often requested (Tr. 2818-2823, 2838-2842, 2850-2860, 3283-3284, 3402, 3407, 3413).

1958, while petitioner and Eveleigh were associated with Jacobs (Tr. 1031). In December 1958, the New York Stock Exchange suspended trading in the stock of Jacobs.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 4, 5, 29-30) that the evidence is insufficient to support his conviction on Counts 1 and 10 through 20—involving the failure to file "insider reports." The evidence is uncontradicted that the "insider reports", required to be filed on Form 4 with the SEC and the New York Stock Exchange for the months indicated in those counts, were never filed with the SEC and the Stock Exchange (Tr. 1032-1034; G. Exs. 180, 181). As for Count 1, petitioner knew that Judson Commercial had caused 4,600 of his shares in Jacobs to be sold by its brokerage house in December 1958 (Tr. 1946, 1949, 1979-1985, 2125, 2212, 2217-2218, 2228, 4786). The fact that petitioner filed a Form 4 with the SEC for September 1958 when he acquired 50,000 option shares of Jacobs confirms other evidence introduced at the trial that he knew that he was obligated to file a Form 4 revealing the changes in the beneficial ownership of his Jacobs shares in December 1958 (Tr. 4052-4053, 4067; App. I, 141-152; G. Exs. 8, 9, 180). As for Counts 10 through 20, the evidence summarized in the Statement, *supra*, pp. 11-12, sufficiently indicates that petitioner not only directed the activities of Comficor, which included the buying and selling of Jacobs stock, but that he knew that Comficor, as a 10% owner of Jacobs shares listed on the New York Stock Exchange, was obligated to file Form 4's with the SEC and the

Stock Exchange indicating the changes in its beneficial ownership of Jacobs shares in December 1957 through July 1958, and November 1958 through January 1959. As such, petitioner was properly convicted as an aider and abettor under 18 U.S.C. 2.

Petitioner contends (Pet. 30-32) that additional shares of Jacobs common stock, which were authorized (but unissued) for the exercise of options and the conversion of preferred shares, should have been added to the shares listed on the New York Stock Exchange for the purpose of calculating Comficor's 10% beneficial ownership in Jacobs. He argues that the "plain meaning" of the term "listed", as defined in SEC Rule 240.3b-1 (17 C.F.R. 240.3b-1, *supra*, p. 4), is that "shares become listed at the time that the exchange grants the authority for them to be listed"; and points out that "authority had been granted by the Stock Exchange for the listing of 1,190,036 shares of Jacobs common stock." The contention, however, is not only bottomed on a misinterpretation of SEC Rule 240.3b-1, but ignores SEC Rule 240.16a-2 (17 C.F.R. 240.16a-2, *supra*, pp. 6-7) and the requirements for the listing of corporate shares on the New York Stock Exchange.

SEC Rule 240.3b-1, *supra*, p. 4, defines the term "listed" to mean "admitted to full trading privileges upon application by the issuer or its fiscal agent * * * and includes securities for which authority to add to the list on official notice of issuance has been granted." Although application for listing may precede notice of issuance of stock, stock is not "listed" on the New York Stock Exchange until official notice of issuance (usually by the transfer agent) has been received by

the Exchange (Tr. 3684-3685, 3689, 3703-3704; see Tr. 3690-3691). Petitioner's claim (Pet. 31) that SEC Rule 240.3b-1 means "that the shares become listed at the time that the exchange grants the authority for them to be listed" is, therefore, incorrect.[9]

Moreover, Section 16(a) of the Securities Exchange Act, *supra*, pp. 2-3, requires every person who is a beneficial owner of 10% or more of any class of equity security which is *registered* on a national securities exchange to file a report with the SEC and the securities exchange indicating the "amount of all equity securities of such issuer of which he is the beneficial owner", and to file a statement with the securities exchange and the SEC for each month during which there has been a change in such beneficial ownership. This monthly statement shall indicate "his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calen-

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[9] Petitioner states that (Pet. 31) "The evidence at the trial was clear that such authority had been granted by the Stock Exchange for the listing of 1,190,036 shares of Jacobs common stock, including 332,607 shares reserved for the conversion of outstanding preferred shares and for the exercise of options, and that no further authority was required from the Exchange for the listing of any of such shares." However, Edward Zuhr, the chief listing representative in the Department of Stock Lists of the New York Stock Exchange, testified that, although Jacobs applied for the listing of some of its common stock for purposes of conversion of outstanding 5% cumulative preferred stock, that particular common stock was never listed on the Exchange because neither Jacobs nor its transfer agent officially notified the Exchange that that particular common stock had been issued by Jacobs (Tr. 3683-3686; see Tr. 3703-3704). The "further authority" which the Exchange needed for the "listing" of that common stock, therefore, was official notice from Jacobs or its transfer agent that the stock had been issued.

dar month." SEC Rule 240.16a-1 (b) implements Section 16(a) by requiring every person who is the beneficial owner of more than 10% "of any class of any equity security (other than an exempted security) which is *listed* on a national securities exchange" to file, if there has been a change in his beneficial ownership of such equity security during any given month, "with each exchange on which any equity security of the issuer is *listed and registered*" a Form 4 indicating "his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month" (emphasis added). Since, in technical parlance, "registered" refers to stock registered with the SEC, and "listed" refers to stock placed upon a stock exchange for public trading (Tr. 3728-3729), it is obvious that the word "registered" in Section 16(a) has the same meaning as "listed" because it applies to stock placed on a national securities exchange for public trading. This is made explicit by SEC Rule 240.16a-2 (17 C.F.R. 240.16a-2, *supra*, pp. 6-7) which provides that, for purposes of determining the 10% beneficial ownership of listed securities, "such class shall be deemed to consist of the amount of such class which has been issued, regardless of whether any part of such amount is not listed or registered or is held by or for the account of the issuer." Since shares are not "listed" on the New York Stock Exchange until the Exchange is given "official notice of issuance" of such shares (Tr. 3684-3685, 3689, 3703-3704; see Tr. 3690-3691, 3702), only "issued" shares (which are "listed" on the exchanges) come within the ambit of

Section 16(a) and SEC Rules 240.16a-1 and 240.16a-2."

If unissued shares were to be added to the issued shares in determining the 10% beneficial ownership figure, the purpose of the statute would be defeated. It would be possible for a person beneficially to own more than 10% of the listed issued shares and still be insulated from filing Form 4's indicating changes in that ownership, for he would not be a 10% owner of the combined issued and unissued shares. The public which trades in issued shares would be deprived of access to the reports and information which the statute and the SEC rules seek to provide for them. See H. Rep. No. 1383, 73d Cong., 2d Sess. at 11-13; *Bank of America National Trust & Savings Ass'n* v. *Douglas*, 105 F. 2d 100, 103 (C.A.D.C.). As the court below observed (App. II, 30; Pet. App. 65), "It is hardly to be thought that the shares to which the 10% beneficial ownership test was to be applied should include shares which could not yet be beneficially owned since they had not been issued."

2. In varying forms, petitioner contends that he was deprived of a fair and impartial trial. None of the alleged bases for the contention has any merit.

a. Most of the publicity complained of (Pet. 7-10, 22-23) occurred well in advance of the trial. Only six out of 43 veniremen had heard of the petitioner and Eveleigh and none of those six sat on the jury (see,

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[10] The maximum number of Jacobs shares listed on the New York Stock Exchange during the months that Comficor failed to file Form 4's was 963,107 (Tr. 1887-1888, 3703-3704). Comficor owned at least 10% of those shares during the months when it failed to file Form 4's with the SEC and the New York Stock Exchange, showing changes in such ownership (App. I, 123).

e.g., Tr. 41, 78, 84, 118-120). No showing was made that the jury, during the trial, was in any way subjected to unfavorable publicity regarding the defendants in the case.[11] After the jury was sworn, the court admonished the jurors to keep an open mind throughout the case, and to refrain from discussing the case (until they had commenced their deliberations) with anyone, or from reading or listening to any accounts of the case, or from watching anything pertaining to the case over television (Tr. 128). This admonition was repeated in substance during the trial (Tr. 1421, 4829). In its instructions, the court told the jury that they were to determine the facts of the case from the evidence introduced at the trial, that their appraisal of the evidence which "came from the witness stand and from the exhibits received in evidence" was controlling, and that they could "only act upon evidence introduced upon the trial and from that evidence alone" (Tr. 4880-4887, 4892, 4934). The jury must be presumed to have followed these instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

b. The claim (Pet. 27-28) that the court improperly marshalled the evidence is without substance. The judge carefully and accurately summarized the evidence pertaining to the various counts in the indictment. A court, in summarizing the evidence, cannot go into all details. Its only duty is fairly and accu-

[11] During the trial, petitioner made only one motion for mistrial based upon adverse publicity. On inquiry by the court, however, petitioner's counsel admitted that he was the source of the offending news item (Tr. 1323-1326, 1395-1396).

rately to summarize the evidence adduced at the trial, and to inform the jury that the summarization is merely the court's recollection of the evidence, which, if contrary to the jury's independent recollection, need not be considered. *Starr* v. *United States*, 153 U.S. 614, 625; *Wiborg* v. *United States*, 163 U.S. 632, 656; *United States* v. *Murdock*, 290 U.S. 389, 394; *Quercia* v. *United States*, 289 U.S. 466, 470. Petitioner noted only eight exceptions to the portion of the court's charge marshalling the evidence. The suggestions which petitioner noted in six of these exceptions were promptly given to the jury in supplemental instructions (Tr. 4977-4982). The fact that the court refused to charge the jury with the suggestions embodied in the remaining two exceptions, which related to Counts 2 and 9, is immaterial, for there could be no prejudice to the petitioner on this score since his conviction on those counts was reversed on appeal.

c. There is also no substance to petitioner's claim (Pet. 25-26) that the Government disobeyed Judge Noonan's order of discovery,[12] thereby causing the defense "to prepare cross examination as testimony was elicited from the lips of Government witnesses without any of the advance preparation to which petitioner was

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[12] On November 13, 1959, more than three weeks before the trial commenced, Judge Noonan granted petitioner's motion for discovery, pursuant to Rule 16, F.R. Crim. Proc., as regards certain documents and information (App. I, 42-44). Discovery was granted, *inter alia*, to "all instruments, papers, documents and records of F. L. Jacobs Co. or others in the possession of the government by which it is alleged that the assets and credit of F. L. Jacobs Co. were transferred, assigned, pledged, hypothecated or otherwise encumbered and subjected to primary and contingent liabilities for the use, benefit and unjust enrichment of defendant, Guterma" (App. I, 43).

clearly entitled." Petitioner fails to point to any specific instance where the Government allegedly disobeyed the order of discovery. Petitioner was granted all that he was entitled to under that order. He was allowed to examine the original documents, and received photostats of all the desired papers several days in advance of the trial (Tr. 34). Before the trial commenced, petitioner requested only ready access to the material (Tr. 31-34). The court then informed the defense, "If you have any trouble at all, let me know because I certainly want you to have access to anything you need" (Tr. 34). During the trial, the court informed defense counsel that additional time would be allotted them within which to examine documents which were subsequently and voluntarily produced by witnesses, and, consistent with this purpose, the court on many occasions granted recesses or longer-than-usual lunch periods in order to allow defense counsel greater opportunity to examine documents (Tr. 1529-1531, 2239, 2241-2241a, 2520-2522, 2896-2897).[13] On one occasion the court excused a government witness in order to allow the defense an opportunity to examine newly produced documents (Tr. 1529-1531). As the court below correctly noted (App. II, 38; Pet. App. 74), "we find either that the documents in question were outside the scope of the order or that defendants were not

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[13] During the trial, most of the documents voluntarily produced by witnesses were shown to the defense in advance (*e.g.*, Tr. 2272-2273, 2523-2525). When the government had mistakenly failed to show certain exhibits to the defense in advance, the court either excused the witness then being examined or gave the defense all the time that it needed within which to inspect the exhibits in question (Tr. 1529-1531, 2241-2241a, 2523-2524).

prejudiced in view of the adjournments given by the trial judge and his clear indication of willingness to grant longer ones if these were requested."

3. The various objections to rulings on the evidence (Pet. 23-25, 26-27, 36-39) are without merit.

a. Government Exhibit 21, the financial statement of Jacobs for the year ending July 31, 1958, was properly introduced into evidence. This exhibit, which was prepared by Ernst & Ernst after petitioner and Eveleigh had left Jacobs, reflected items in Jacobs' books of account as adjusted by Locke, who, subsequent to March 1959, worked for the trustees (in reorganization) of Jacobs (Tr. 630-631, 657-658, 669-670, 678-681). The exhibit was admitted into evidence subject to proof by the Government of the foundation for Locke's adjustments (Tr. 875-878).[14] Locke later testified that his adjustments did not represent "opinion", but that they were based upon a worksheet prepared by Lipton before March 1959, specific agreements and letters found in Jacobs' files, and various mechanical adjustments (Tr. 2847, 2861-2862, 2910, 3234-3235, 3301). The mere fact that Ernst & Ernst was unable to certify the accuracy of the exhibit because specific financial information was unavailable for completion of audit purposes (Tr. 843-847) does not detract from the admissibility

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[14] A few moments before the government rested its case, counsel for Eveleigh noted that Government Exhibit 21 was admitted subject to a motion to strike at the close of the government's case (Tr. 3999, 4004). None of the defendants moved to strike the exhibit at that time. Counsel for Eveleigh, who had used the exhibit in cross examination (Tr. 3981), subsequently relied upon it during his summation (Tr. 4647-4650).

of the exhibit, for any attack on the accuracy of the underlying book entries of a summary goes to the weight, not the admissibility, of the summary in question. *Rudin* v. *United States*, 254 F. 2d 45, 49 (C.A. 6), certiorari denied, 357 U.S. 930. Moreover, petitioner cannot be heard to complain that the summary is intrinsically inaccurate when any inadequacy is due to his neglect, as a fiduciary, in maintaining complete and accurate records. *Bowen* v. *United States*, 153 F. 2d 747, 751 (C.A. 8), certiorari denied, 328 U.S. 835. Cf. *Brady* v. *United States*, 26 F. 2d 400, 402 (C.A. 9), certiorari denied, 278 U.S. 621.

b. At the trial, petitioner sought an advance ruling from the court that the Government could not cross-examine him in areas relating to the subject matter of three other indictments pending against him. The court held that it could not make such a ruling "in vacuum", that its function was not to give "academic opinions", and that it would rule upon questions propounded to the petitioner if and when he took the witness stand (Tr. 2491-2495, 4117-4120, 4191-4194).[15] The court held that the scope of cross-examination would have to remain within the bounds of Supreme Court decisions and *United States* v. *Provoo*, 215 F. 2d 531 (C.A. 2). It cautioned the Government to use "restraint" in this area and to approach the bench if there was any doubt concerning the propriety of a question (Tr. 2491-2495, 4117-4120, 4191-4194). Petitioner's

[15] The trial court, in noting that there was no authority for such an advance ruling, stated that "in this area here the practice is sometimes to rule on the issue even to the point of making the prosecution state its questions in writing ahead of time" (Tr. 1258-1260, 2492).

complaint (Pet. 36-39)—that the refusal of the court to make such an advance ruling was an abuse of the "prosecutorial function"—is without substance in law and logic. It cannot be seriously contended that the trial court should delimit the scope of questions which have not been formulated and an examination which has not yet commenced, as respects a party who may never become a witness. As the court below correctly noted (App. II, 38; Pet. App. 74), "We are not aware of any requirement for such a ruling and Guterma had no reason to suppose objections to cross-examination would not be dealt with properly if he chose to take the stand." [16]

c. Petitioner contends (Pet. 23-25) that the trial court erred in refusing to strike paragraph 7 of the conspiracy count (Count 21), which charged that it was a part of the conspiracy for the defendants and the co-conspirators to transfer and pledge the assets of Jacobs for the unjust enrichment of the petitioner and others.[17]

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[16] The trial court concluded that petitioner was "not acting in good faith" in pressing his application to limit cross-examination (Tr. 4191). On December 17, 1959, counsel for petitioner indicated that petitioner would testify on his own behalf (Tr. 1259). On January 20, 1960, counsel indicated that petitioner would not testify (Tr. 4101). The following morning, counsel stated that petitioner would testify if he received the advance ruling indicated (Tr. 4117). When the trial court refused to make such a ruling, counsel announced his "final conclusion"—that petitioner would not take the witness stand (Tr. 4117-4118, 4191).

[17] Paragraph 7 of Count 21 provides as follows (App. I, 34-35): "It was further a part of said conspiracy that the defendants Alexander L. Guterma, Robert J. Eveleigh, F. L. Jacobs Co., Conficor, Inc., Chatham Corporation, and co-conspirators Austin J. Hare, Salvatore R. Pavis, Garland L. Culpepper, Jr., and Seymour B. Lipton would transfer, assign, pledge, hypothecate, and otherwise encumber and subject to primary and contingent liabilities and caus-

Petitioner's claim is that, as a result of this paragraph, the "floodgates" were opened to the receipt of irrelevant and prejudicial evidence of corporate looting and stock manipulation. The evidence, however, was admissible, and the judge properly instructed the jury as to the crimes charged.

As the court below held (App. II, 23; Pet. App. 60), "it was relevant for the government to show that the conspiracy was motivated by a scheme to appropriate assets of Jacobs for defendants' benefit and to demonstrate what the facts were that defendants allegedly wished to conceal from the SEC and the public."[18] Had Jacobs' annual report on Form 10-K for 1958 and Comficor's insider reports on Form 4 been filed with the SEC and the New York Stock Exchange, the government, the Exchange and the investing pub-

to be transferred, assigned, pledged, hypothecated, and otherwise encumbered and subjected to primary and contingent liabilities, assets of F. L. Jacobs Co. for the purpose of making the assets and the credit of F. L. Jacobs Co. available for the use, benefit and unjust enrichment of defendants Alexander L. Guterma, Robert J. Eveleigh, Comficor, Inc., and Chatham Corporation."

[18]As indicating motive for failure to file, the government, in addition to evidence of trading in stock by petitioner and Comficor, did show "looting" of Jacobs. *E.g.*, in December 1957, Comficor, as payee of a $250,000 note, sold the note, for the face amount plus accrued interest, to Jacobs, and then collected the face amount of the note from the maker (Tr. 1749-1752). Petitioner and Eveleigh directed the formation of the Classic Carpet Corporation from which Jacobs purchased for more than a million dollars an inventory of automobile fiber mats, half of which it already owned (Tr. 845, 1752-1755, 2882-2886, 3028-3041; G. Ex. 477-485). To effect this purchase, Jacobs authorized the issuance of irrevocable letters of credit, charged against its accounts, in favor of Classic Carpet (Tr. 845, 1752-1757, 3028-3041). None of these obligations was recorded on Jacobs' financial books (Tr. 793, 1757). Following its discount of the letters of credit, Classic Carpet, in a series of payments, disbursed $689,000 to the petitioner, Comficor, and Chatham (G. Ex. 397-398, 435-443, 478-485).

lie would have been made aware of the fact that, while Jacobs' assets were diminishing at a substantial rate, the market value of its stock was being artificially maintained through substantial periodic stock purchases by Comficor. See the Statement, *supra*. It is well established that evidence of the commission of state and local offenses is admissible where it relates to or reveals the purposes underlying a federal conspiracy. *Giordano* v. *United States*, 251 F. 2d 109, 111, 115 (C.A. 8), certiorari denied, 356 U.S. 973 (conspiracy to violate internal revenue laws; evidence of counterfeit city tax stamp die used to defraud city of tax revenue held admissible); *Fields* v. *United States*, 228 F. 2d 544, 547-548 (C.A. 4), certiorari denied, 350 U.S. 982 (conspiracy to defraud citizens of federal rights; evidence of violation of state election laws held admissible). Moreover, it was proper to show that petitioner shared in the fruits of the conspiracy (*i.e.*, loans to the petitioner secured by Jacobs' assets) in order to establish the requisite intent. *United States* v. *Johnson*, 254 F. 2d 175, 176 (C.A. 2). See also *United States* v. *Crowe*, 188 F. 2d 209, 212-213 (C.A. 7); *United States* v. *Feldman*, 136 F. 2d 394, 399 (C.A. 2), affirmed, 322 U.S. 487; *United States* v. *Puff*, 211 F. 2d 171, 175 (C.A. 2), certiorari denied, 347 U.S. 963. At the close of the instructions, petitioner requested the court to grant his jury request No. 59. In a manner which was satisfactory to the petitioner, the court instructed the jury, "That if you find that the only purpose of this conspiracy was so that the defendants could loot the assets of the Jacobs Company for their own benefit, that would not in itself constitute a crime; it

would be evidence which you might consider, though, in determining whether they had defrauded the United States in the exercise of its governmental function" (Tr. 4987).

The trial court instructed the jury on the elements of the offenses which they must find beyond a reasonable doubt in order to convict on Counts 1, 5, and 10-20; dissected the evidence relating to these counts; and reminded them that their recollection of the evidence was controlling (Tr. 4899-4950). With respect to the conspiracy count, the court instructed on numerous occasions that the petitioner and the other defendants were charged with conspiring to "violate the provisions of the Securities Exchange Act of 1934 and to defeat the official functions of the SEC" (Tr. 4894-4895, 4951-4953, 4959-4960, 4963, 4969, 4970); that in order to convict any of the defendants on the conspiracy count the jury must find that the conspiracy charged in this count existed; and that the defendants participated in the conspiracy with knowledge of its objectives (Tr. 4959-4960, 4970). It also charged that "(e)ach count of the indictment must be considered separately, and the guilt or innocence of each defendant referred to in that count must be determined separately" (Tr. 4973). These instructions, which satisfied the petitioner,[19] must be presumed to have been fol-

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[19]Aside from request No. 59, referred to in the text, *supra*, which was granted, petitioner's only other request to charge regarding the conspiracy count, made at this time, concerned its request No. 53. That request, which dealt with reasonable doubt in connection with the conspiracy, was denied on the ground that the court had previously charged on the "elements of the crime and reasonable doubt" (Tr. 4985-4986).

lowed by the jury. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.[20]

4. Petitioner challenges the constitutionality of several portions of the Securities Exchange Act and SEC Rule 240.16a-1 (17 C.F.R. 240.16a-1, *supra*, pp. 5-6) promulgated thereunder. These contentions are insubstantial.

a. Petitioner first contends (Pet. 28-29) that Section 16(a) of the Securities Exchange Act, *supra*, and SEC Rule 240.16a-1 are invalid on the ground that they are "so vague and indefinite in their meaning as to fail to establish an ascertainable standard of guilt." Although he does not here specify his contentions, his challenges to Section 16(a) were considered by the court below (App. II, 24; Pet. App. 61):

> One relates to the phrase requiring a report of "any change in such ownership during such month"; this is asserted to be too vague, at least as applied to the facts here where, in many instances, the "change" occurred through sale by

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[20] *Parr* v. *United States*, 363 U.S. 370, on which petitioner relies (Pet. 23, 25), is inapposite. In that case this Court held that although the evidence disclosed a scheme to defraud, it did not disclose that the mails were used in furtherance of that scheme. *Id.* at 381-383, 389-393. The Court noted (*id.* at 393-394) that the government's evidence, which indicated the commission of state crimes, did "not establish the federal crime of using the mails to defraud", and that "no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." In the instant case, however, the evidence sufficiently shows that petitioner willfully failed to file the proper forms with the authorities, that he and Evenchik hindered and obstructed the filing of Jacobs' annual report for 1958, and that he and others conspired to violate these provisions of the Securities Exchange Act and to defraud the United States of a governmental function. See the Statement, *supra*.

a pledgee. The other, in the case of the Comficor accounts, 10-20, related to the phrase "the beneficial owner of more than 10 per-centum of any class of any equity security." We find no merit in these contentions; indeed they border on the frivolous. As said by Chief Justice Hughes in *Sproles* v. *Binford*, 286 U.S. 374, 393 (1932), "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding."

There is no need for the Securities Exchange Act or the SEC rules to define "beneficial ownership" as appearing in the statute and rules, as petitioner contends (Pet. 30). That term is distinguished from "record ownership" (Tr. 1104-1106; see Tr. 4943), and is one whose appearance is "quite frequent in the law." *Montana Catholic Missions* v. *Missoula County*, 200 U.S. 118, 127-128; see and compare, *Miller* v. *Strahl*, 239 U.S. 426, 434; *Sproles* v. *Binford*, 286 U.S. 374, 393. Petitioner, apparently, had no trouble in understanding the term when he told the New York Stock Exchange that Comficor lacked sufficient stock in Jacobs to report on Form 4's (Tr. 4052-4053, 4076).

b. There is no merit in petitioner's challenge to the constitutionality of Section 32(a) of the Securities Exchange Act, *supra*, pp. 3-4 (Pet. 23-36) on the ground that the final clause of that section shifts the burden of proof of the element of willfulness to the petitioner. In Section 32(a), Congress made it a crime, subject to fine and/or imprisonment, willfully to violate the Securities Exchange Act or any rule or regulation promulgated

thereunder. In the final clause of that section, Congress limited the punishment to a fine where the violator of a rule or regulation (not the statute) could prove that "he had no knowledge of such rule or regulation." In other words, Congress allowed "ignorance of the law" (*i.e.*, ignorance of a rule or regulation) to be interposed as a defense where the violator is proceeded against for violation of a rule or regulation—not where he is proceeded against, as here, for violation of the statute itself (App. 1, 15, 19, 23-33). See H. Rep. No. 1838, 73d Cong., 2d Sess., at 38 (House Conference Report). Thus, the clause which petitioner attacks is not even applicable to his case.

One may willfully commit a crime without having specific knowledge of the statute making the act a crime. The word willful means no more than the act must be done deliberately, rather than accidentally. *Browder* v. *United States*, 312 U.S. 335, 341-342. There is thus no inconsistency between a provision punishing willful conduct and another provision lessening the penalty where it is shown that the willful conduct was undertaken without knowledge of the regulation. In this case, the indictment charged that the acts were done willfully and knowingly, and, as discussed *supra*, the evidence shows that petitioner did in fact have knowledge of his duty to file Form 4's.

5. Petitioner contends (Pet. 39-44) that the imposition of $10,000 fines on each of the counts on which he was convicted contravenes the "policy of lenity" announced by this Court in *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218, and other cases. Count 1 (relating to petitioner's personal duty to file a Form 4) and Count 5 (relating to the annual

report) refer to matters clearly distinct from Counts 10 through 20 (relating to reports by Comptroller) (App. I, 15, 18-19, 22-33). As for Counts 10 through 20, the statute and its legislative history support the holding that willful failures to file monthly reports required under the Act constitute separate offenses for each failure to file a monthly report. Section 16(a) requires the filing *each month* of a Form 4 in certain contingencies, and Section 32(a) punishes *any violator* of *any* provision of the statute or rules or regulations promulgated thereunder. See also, H. Conf. Rep. No. 1838, 73d Cong., 2d Sess. at 38. These sections must not only be read together, but they must be read against the background of the legislative history of the Securities Exchange Act which seeks to provide prompt disclosure in protecting the investing public. See H. Rep. No. 1383, 73d Cong., 2d Sess., at 11-13; *Bank of America National Trust & Savings Ass'n.* v. *Douglas*, 105 F. 2d 100, 103 (C.A. D.C.).

The *Universal C.I.T.* case is inapposite since the statutory and regulatory scheme of the Securities Exchange Act and its legislative history are not analogous to the provisions of the Fair Labor Standards Act at issue there. In that case, this Court pointed out that the original bill came to the Conference from the House of Representatives with the separate offense clauses specifically deleted, while the Senate had retained one of two separate offense clauses, and that "[t]he Conference accepted the House version, with neither separate offense clause, but raised the maximum fine to $10,000." 344 U.S. at 223-224. See also, H. Rep. No. 2182, 75th Cong., 3d Sess., p. 14. But the penalty provision of the instant statute, penalizing any violator of

any provision of the statute or rule or regulation, is substantially the same as the House and Senate versions which came to and which were adopted by the Conference Committee. See H. Conf. Rep. No. 1838, 75d Cong., 2d Sess., at 38. As the court below correctly pointed out (App. II, 37; Pet. App. 73), "There is no such legislative history here as the Supreme Court found so persuasive with respect to the Fair Labor Standards Act in *CIT*; furthermore changes in beneficial ownership are more discrete and independent than the normal situation with respect to employment at too low wages or too long hours." In this case the evidence shows numerous separate transactions involving the acquisition and disposition of stock; the factual situation was subject to constant change, calling for individual determinations as to whether or not to comply with the law. The failure to file each month was therefore a separate managerial decision arising from a separate impulse and properly subject to a separate fine.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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